No. (1)

In The

Supreme Court of the United States

A. STEPHAN BOTES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Eleventh Circuit Court of Appeals erred by accepting the government's position that appearance of impropriety is *not* the proper standard for recusal of trial court and judicial candidates.

II. Whether the Eleventh Circuit Court of Appeals appellate review for "unreasonableness" has preserved de facto mandatory Guidelines, contrary to this Court's ruling in *Booker*[1] and its progeny.

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[1] *Booker v. United States*, 125 S.Ct. 738, 543 U.S. 220 (2005).

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PETITION FOR A WRIT OF CERTIORARI

A. Stephan Botes petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The order of the Eleventh Circuit affirming Petitioner's conviction and sentence, was filed on August 25, 2008, and is unpublished. It is attached as Appendix A. The order of the Eleventh Circuit denying the petition for rehearing and rehearing *en banc* was denied on October 27, 2008, and is attached as Appendix B.

JURISDICTION

The Court of Appeals affirmed Botes' conviction and sentence on August 25, 2008. Botes' petition for rehearing and rehearing en banc was denied on October 27, 2008. The Honorable Clarence Thomas granted petitioner's motion for a continuance in the time to file his application for *certiorari*, setting the date of March 26, 2008. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Sentencing Reform Act of 1984 (SRA) (Pub. L. 98-473, Title II, Ch. II, October 12, 1984, 98 Stat. 1987).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides "No person shall be held to answer for a . . . crime, unless upon a presentment or indictment of a Grand Jury" and that a criminal defendant is entitled to "due process of law." The Sixth Amendment to the United States Constitution provides for a jury trial in all criminal prosecutions and that the defendant be informed of the nature and cause of the accusation.

STATEMENT OF THE CASE

The Eleventh Circuit's decision of August 25, 2008, affirmed Botes' conviction and sentencing after a jury trial. Botes was convicted in the federal prosecution of former Georgia gubernatorial candidate, Linda Schrenko, who was the ex-State School Superintendent, along with other school board staff and people associated with Botes' company.

Botes was convicted of conspiracy to embezzle federal funds and deprive Georgia of Linda Schrenko's honest services, twelve counts of aiding and abetting embezzlement of federal funds, and

three counts of wire fraud.[2] He was acquitted on the remaining thirty-three counts of wire fraud, money laundering, and structuring.

The conspiracy count alleged Schrenko and Temple, who was her lover and campaign manager, gave Botes' company contracts for computer software and technical assistance. In turn, Botes was alleged to have funneled money to Schrenko's campaign to become the Republican nominee for Governor of Georgia. Botes denied the charges and maintained Temple conspired with Botes' controller and an outside consultant to steal money from his business and funnel it to the campaign. Shrenko subsequently testified she had no conspiratorial dealings with Botes, and all of her information came from Temple. Temple, who had double-crossed the government, was not called as a witness in the case, but Schrenko's mid-trial plea allowed the government to use alleged statements made to and by Temple against Botes at trial.

Botes' case garnered a great deal of publicity because of his co-defendant, Linda Schrenko. The first day of trial, testimony was cut short for the district court to attend a judicial obligation. The judges of the Northern District of Georgia were

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[2] Botes was convicted on count one: violation of 18 U.S.C. § 371; counts two to twelve, aiding and abetting embezzlement of federal funds 18 U.S.C. §§ 666(a)(1)(A), 2; counts eighteen, twenty, and twenty-one, wire fraud 18 U.S.C. §§ 1343, 1346, 2.

meeting to select the new magistrate judge, and the trial court supported Vineyard, who was also the lead prosecutor in the Schrenko/Botes prosecution.

The next day it was announced Vineyard had been selected as the new magistrate judge in the district. Botes move for mistrial based on an appearance of impropriety. The government opposed the motion and argued appearance of impropriety was not the proper standard. The district court overruled the motion for mistrial.

On appeal to the Eleventh Circuit, Botes again raised the issue, contending his trial was fundamentally flawed by the appearance of impropriety from the outset. He pointed to several actions during the trial which supported his contention there was an appearance of impropriety surrounding the case, stemming from the trial judge's active participation and support of the man who was prosecuting Botes.

Botes raised other weighty issues regarding the lawfulness of his conviction. He contended the jury was inaccurately and insufficiently instructed regarding his intent and his theory of defense. Consequently, the jury lacked critical tools for analyzing the evidence, leading to Botes' erroneous conviction on fifteen counts, despite acquittal on the remaining thirty-three counts. Botes also established in his appellate brief he was not allowed to present critical evidence, and the court improperly allowed inadmissible hearsay evidence to infect the jury.

Finally, Botes urged the Eleventh Circuit to reverse his 97-month sentence because the district court explicitly failed to consider the 18 U.S.C. § 3553(a) factors, misapprehending its responsibility to consider the Guidelines as but one of the enumerated factors, and to select a sentence no greater than necessary to achieve the purposes of the statute.

In a single sentence, the Eleventh Circuit dismissed all of Botes' arguments, despite the fact they were well grounded in fact, and law. In summarily rejecting Botes' appeal, the Eleventh Circuit allowed the district court to reject an appearance of impropriety as the proper standard for recusal, and allowed an unconstitutional sentence to stand.

Mr. Botes is serving his sentence at the Federal Correctional Institution (contract facility) in Post, Texas.

REASONS FOR GRANTING THE WRIT

I. Botes respectfully requests this Court grant his petition, vacate his conviction and sentence, and remand his case to the Eleventh Circuit to consider his arguments in light of the Court's expected resolution in *Hugh M. Caperton v. A.T. Massey Coal Company*, 129 S.Ct. 593 (Mem.) (2008).

In *Caperton*, this Court granted *certiorari* to resolve a recusal issue. The *Caperton* Petitioner contends Due Process requires the recusal of West

Virginia Supreme Court Justice Benjamin from participation in his principal financial supporter's case. The resolution in *Caperton* necessarily depends on the Court's determination whether disqualification is required for an appearance of bias, or whether recusal is required only upon proof of actual bias. It appears the lower courts are split on the issue of whether Due Process prohibits both actual bias or the appearance of impropriety.

In Botes' case, the government argued appearance of impropriety was too "slender a reed" to support recusal of the prosecutor who was a judicial candidate and therefore subject to the same rules governing judges under Georgia Law, and the district court judge. The Eleventh Circuit provided no rationale for its decision, therefore, it must be assumed the lower court relied upon the argument of the government in rejecting the defense position regarding appearance of impropriety. Consequently, Botes' case should be held in abeyance pending the disposition of *Caperton*, and if the Court holds Due Process requires recusal of judges [and therefore judicial candidates under Georgia Law] upon a showing of an appearance of bias, he requests this court grant his petition, vacate his conviction and remand his case for the Circuit court to apply the correct standard.

II. Botes also requests this Court to grant his petition, vacate his sentence and remand his case for the Circuit to reconsider its summary rejection of his sentencing argument in light of this Court's recent decision in *Nelson v. United States*, ___ U.S. ___, 129

S.Ct. 890 (2009), which was issued after the Eleventh Circuit decided Botes' case.

ARGUMENT AND CITATIONS OF AUTHORITY

I. APPEARANCE OF IMPROPRIETY IS THE PROPER STANDARD FOR RECUSAL OF A JUDGE, AS WELL AS THE RECUSAL OF A JUDICIAL CANDIDATE.

On the first day of trial the district court adjourned early to attend a "judicial obligation." The judicial obligation was the district court's participation in the selection of a new magistrate judge to replace a retiring judge. The next day the defense learned lead prosecutor in the case, Russell Vineyard, had been honored by selection as the new full-time magistrate judge in the district. His job duties would begin shortly after trial.

The position of United States Magistrate Judge is authorized by 28 U.S.C. § 631, *et seq*. Magistrate judges are selected by the district court judges of each district and perform a wide range of duties in order to assist and expedite the District Court docket. Essentially, the magistrate judge assists and "works" for the district court judge. The magistrate judge is forbidden to practice law while acting as a full time magistrate. Tellingly, if the position is part-time, the magistrate judge is not forbidden to practice law, but may not act as counsel in a criminal matter. 28 U.S.C. § 632.

Botes moved for mistrial and objected to Vineyard's prosecution of the case, which created an appearance of impropriety. Not only would Vineyard soon be working for the judge before whom the case was tried, but, the judge also informed the parties he supported and participated in the decision to select Vineyard.

Vineyard's prosecution of the case over the objection raising an appearance of impropriety was improper, and resulted in a trial with a "built in" appearance of impropriety. The court's rulings – whether intended to help a future colleague, or employee or not – appeared improper. Knowing their trial adversary soon would be ruling on their future pretrial motions, defense counsel expressed concern they could not vigorously defend. Nonetheless, the court denied the motion.

The district court should have granted the motion, or required the prosecution case to go forward with co-counsel, who was readily available, on the basis the prosecutor and the court are both charged with avoiding even the appearance of impropriety.

There was no question below the court and the attorneys all recognized the appearance of impropriety involved in a case where the lead prosecutor was appointed with the active support and participation by the district court. The district court certainly acknowledged it saying:

> I'm concerned about the appearance that any decision I might make, especially with

> regards to discretionary decisions in favor of the government, may be interpreted as my having done it simply because now you [Vineyard] you are about to become a magistrate judge. It does create a lot of problems. (Doc. 335-173).

The government's argument centered on its assertion only an actual conflict could disqualify counsel and the appearance of impropriety was insufficient. (Doc. 335-177). The Government tacitly acknowledged the appearance of impropriety during the in chambers conference when it said:

> The government would respectfully request, ***given the significance of what's been raised, if we could report back to the court after having*** the opportunity to confer within my office, and, candidly with attorneys in Washington. (Doc. 335-185).

Thus, below, and in its appellate brief, the government argued, based on *Waters v. Kemp*, 845 F.2d 260, 265 n.12 (11th Cir. 1988) the "appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest of cases," and that "appearance of impropriety standard was the standard under the old model code that was in effect until 2000." (Doc. 335-177; Government's brief in the Circuit Court at 37).

The Eleventh Circuit's acceptance of the government's position overlooks the fact that under the Georgia Rules of Professional Responsibility, the prosecutor, as a judicial candidate, is subject to the

Code of Judicial Conduct, requiring him to avoid even the appearance of impropriety. (*See*, Georgia Rules of Professional Conduct, Part IV (After January 1, 2001), Rule 8.2 Judicial and Legal Officials (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct; The Code of Judicial Conduct includes candidates for judge, either by election or appointment; Cannon 2 states "Judges Shall Avoid Impropriety and the Appearance of Impropriety in All Their Activities."

This conclusion is inescapable, as the government acknowledged, "[m]otions to disqualify are governed by two sources of authority: the local rules of the court in which attorneys appear, and federal common law." (Government's brief in the Circuit Court, page 36). The government also acknowledged the Georgia Rules of Professional Conduct govern the professional conduct of bar members of the United States District Court for the Northern District of Georgia. *Id.*, citing N.D.Ga.R. 83.1(c). Thus, the Georgia Rules of Professional Responsibility as applied to the judicial candidate Vineyard, required him, through the Cannons of Judicial Conduct, Cannon 2, to avoid even the appearance of impropriety. The Eleventh Circuit opinion, which contained no analysis, necessarily concurred with the government's argument which overlooked and conflicted with controlling precedent.

Vineyard's recusal was required to avoid the appearance of impropriety, and if not, the district

court should have recused himself. 28 U.S.C. § 455(a). An appearance of impropriety is determined by a reasonableness standard – whether "an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality, and any doubts must be resolved in favor of recusal." *United States v. Patti,* 337 F.3d 1317, 1321 (11th Cir. 2003) (citations omitted). A reasonable lay person, upon learning the trial judge had recently selected the prosecutor to a position on the same court, and working for the court, would question whether the court could act without bias and whether the appointment would incur bias and unfairness in the judicial system trying Botes.

This was a close case. Botes was acquitted on the majority of counts after the jury deliberated for days. Lay observers could conclude the court, however unintentionally, ruled in the government's favor at a crucial time – a ruling tipping the scales of justice. Similarly, defense counsel may not have argued quite as forcefully against Judge Vineyard's position as they might have against prosecutor Vineyard's position. Lay observers could conclude this reluctance tipped the scales of justice. Indeed, a legal observer could easily conclude the same in the context of the court's erroneous jury instruction in answer to the jury's final question.

The Eleventh Circuit's decision overlooks the proper standard as applied to the prosecution's recusal when the prosecutor was a "judicial candidate" within

the meaning of the Cannons of Judicial Conduct, is avoiding the appearance of impropriety. The Circuit court overlooked its own precedent emphasizing the duty to recuse under 28 U.S.C. § 455(a) is "affirmative, self-enforcing obligation to recuse *sua sponte* whenever proper grounds exist." *United States v. Kelly*, 888 F.2d 732 (11th Cir. 1989).

Petitioner respectfully requests this Court hold this case for its decision in *Caperton*, and in the event the Court finds appearance of bias requires recusal, to vacate his conviction and remand the case for Eleventh Circuit to apply the proper standard.

II. THE DISTRICT COURT TREATED THE SENTENCING GUIDELINES AS *DE FACTO* MANDATORY IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

The judge in Botes' case began the sentencing explicitly stating he was imposing sentence within the guideline range. At the conclusion of the hearing the judge explicitly noted he had ***not*** sentenced Botes based on the 18 U.S.C. § 3553(a) factors. Both statements are fatal to the constitutionality of Botes' sentence, as they reveal the judge was operating under a presumption that a guideline sentence should be imposed, and its task was either to impose a sentence under § 3553 *or* the Guidelines. The judge's application of this presumption, coupled with his inattention to the mandatory § 3553 factors, resulted in the court's imposition of an unreasonably harsh,

97-month sentence, defying the "parsimony provision" of § 3553. Because the record is clear the judge did not consider the factors within the meaning of the remedial portion of *Booker v. United States*, 543 U.S. 220, 125 S.Ct. 738 (2005), the sentence is reversible on this ground.

The record is also clear the judge indulged in an unconstitutional presumption the Guidelines applied. Because the Eleventh Circuit failed in its duty to reverse the sentence in this case, this Court should exercise its supervisory powers and grant this petition, vacate the sentence and remand the case to the Eleventh Circuit in light of this Court's holding in *Nelson v. United States*, ___ U.S. ___, 129 S.Ct. 890 (2009).

Almost immediately upon taking the bench, directly after the judge stated the sentencing options he said:

> Before the court imposes a sentence ***within the applicable custody guideline range***, the Court wishes to resolve the pending guideline issues. (R29-4) (emphasis added).

After making guidelines determinations, the judge reiterated he was going to impose a sentence within the guideline range, stating:

> . . . the Court is now ready to sentence the defendant, . . . ***within the applicable custody range***, which is now 97-121 months. (R29-29) (emphasis added).

Before hearing any evidence, argument, or allocution, the judge demonstrated he was only considering a Guidelines sentence instead of considering the § 3553 factors.

Botes asked the judge for a non-guidelines sentence in light of § 3553(a) factors. The judge, consistent with his earlier pronouncements regarding the Guidelines, imposed a sentence of 97-months, stating:

> Let the record reflect the Court had considered sentencing the defendant pursuant to 18 U.S.C. § 3553 and the factors outlined therein. However, the Court decided ***not*** to since a more appropriate sentence can be imposed pursuant to the custody guideline range as outlined in the U.S. Sentencing Commission. Also, the Court has sentenced the other defendants pursuant to the guideline range. (R29-67).

In order to avoid violating the Sixth Amendment, this Court held in *Booker* the sentencing court must not apply the Guidelines in a mandatory manner and the Guidelines are advisory. The *Booker* ruling now requires the court to consider the factors set forth in 18 U.S.C. § 3553(a) in fashioning a sentence which is "sufficient, but not greater than necessary, to comply with the purposes" set forth in § 3553(a)(2). Here, instead of following *Booker*, the judge stated he did *not* impose sentence with reference to the factors, but rather imposed a Guideline sentence, noting he imposed a Guideline sentence upon the co-defendants. The judge misconstrued the task of the sentencing

court, and left the remedial portion of *Booker* unfulfilled.

In *Rita v. United States*, 127 S.Ct. 2456 (2007), this Court, made clear it is error for the sentencing court to presume a sentence under the Guidelines should be imposed. The Court said: "[w]e repeat that the presumption before us is an *appellate* court presumption." *Rita*, at 2465 (emphasis in original). The Court also stated:

> In determining the merits of these arguments, [regarding the application or not of the guidelines] the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply. *Rita*, at 2465, *citing Booker*, 543 U.S., at 259-260.

Recently, in summarily reversing the Fourth Circuit in *Nelson v. United States*, this Court once again told the Circuit courts not to tolerate district court presumptions.

Since *Booker*, the Circuits have continued the practice of upholding all sentences within the Guideline range, reversing many below the range, and affirming sentences above the guideline range. *See*, Professor Berman, Sentencing Law & Policy Blog, noting *United States v. Gammicchia*, 498 F.3d 467 (7th Cir. 2007); and *United States v. Lessner*, 498 F.3d 185 (3rd Cir. 2007); *United States v. Hurn*, 496 F.3d 784 (7th Cir. 2007); *United States v. Ruhbayan*, 527 F.3d 107 (4th Cir. 2007), http://sentencing.typepad.com/sentencing_law_and_policy/2007/week32/index.html.

To date, counsel is aware of only one sentence within the guidelines range reversed by any circuit court for substantive unreasonableness. *See*, Professor Berman, Sentencing Law & Policy Blog, citing to *United States v. Paul*, 239 Fed.Appx. 353 (9th Cir. 2007), http://sentencing.typepad.com/sentencing_law_and_policy/2007/08/ninth-circuit-r.html#comments.

In cases such as Petitioner's, the Eleventh Circuit Court has also failed to engage in any meaningful analysis, and instead, summarily affirmed the sentence. Thus, the remedial portion of *Booker* has failed to cure the constitutional problem of mandatory guideline application.

The problem with Botes' sentence is in relying exclusively on the Guidelines, the court imposed a substantively unreasonable sentence – significantly longer than necessary to achieve the purposes of the Sentencing Reform Act – thereby violating the "parsimony provision" of 18 U.S.C. § 3553(a). As the parsimony provision is the overarching goal – to impose a sentence "'sufficient, but not greater than necessary,' to achieve the goals of sentencing," the district court utterly failed in its task. *Kimbrough v. United States*, 128 S.Ct. 558, 570 (2007); 18 U.S.C. § 3553(a).

The mechanical application of the Guidelines' loss tables may overstate a defendant's culpability and lead to sentences that are not reasonable under 18 U.S.C. § 3553(a). This is particularly true in Botes' case where he received a 14 level increase due to the

amount of loss in the case and none of the mitigating factors are considered under the Guidelines' express prohibition. U.S.S.G. § 5H1.1 through 6.

This case involved a multi-week trial, coupled with acquittal on the majority of the counts. Completely ignored by the court was Botes' extraordinary personal background, lack of a criminal record, ruin of his business, loss of his home, probable deportation, and low risk of recidivism – all factors under § 3553(a) which should have been central to the sentencing analysis, rather than being overlooked for a mandatory application of the Guidelines. The judge's excessive reliance on the guidelines relative to the many other considerations set forth in § 3553(a) was procedurally unreasonable. The sentence should be reversed because the court failed to "reflect due consideration of the factors and policies that animate § 3553(a), thereby rendering the sentencing procedurally unreasonable". *United States v. Gibson*, 424 F.3d 1234, 1254 (11th Cir. 2005).

In *Booker*, Justice Scalia asked, "Will appellate review for 'unreasonableness' preserve de facto mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges?" As long as the appellate courts are allowed to render opinions which contain no analysis and ignore the record of the district court committing procedural error, the answer in the Eleventh Circuit will remain, "yes."

CONCLUSION

Because the Eleventh Circuit failed in its duty to reverse the sentence in this case, this Court should exercise its supervisory powers and grant this petition, vacate the sentence and remand the case to the Eleventh Circuit in light of this Court's holding in *Nelson*.[3]

Dated: This 26th day of March, 2009.

Respectfully submitted,

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[3] Petitioner also requests that the Court hold his case for disposition on *Caperton v. Massey*, *supra*, and if the Court rules an appearance of bias requires recusal, for the Court to grant his petition, vacate his conviction and remand his case to the Eleventh Circuit on this ground as well.

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-15238

D. C. Docket No. 04-00568-CR-CC-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

A. STEPHAN BOTES,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed August 25, 2008)

Before WILSON, PRYOR and COX, Circuit Judges.

PER CURIAM:

A. Stephan Botes was convicted of conspiracy to embezzle federal funds by a state agent and conspiracy to commit a scheme to defraud the State of Georgia and its citizens of money and honest services

(Count 1), embezzlement of federal funds (Counts 2-12), and wire fraud (Counts 18, 20-21). He was sentenced to 97-months' imprisonment and the district court entered an order of restitution and a criminal forfeiture judgment against him in the amount of $382,394.

On appeal, Botes argues the following: (1) the denial of Botes's mistrial motion following the lead prosecutor's selection for a federal magistrate judgeship requires reversal of his convictions; (2) the evidence was not sufficient to support his conviction for conspiracy to defraud the state of Georgia and deprive Georgia of the honest services of state school superintendent Linda Schrenko; (3) the evidence was not sufficient to show that Botes aided and abetted a scheme to defraud Georgia; (4) the district court improperly instructed the jury on aiding and abetting; (5) the evidence was not sufficient to show that Botes engaged in a scheme to defraud Georgia via wires; (6) the district court's evidentiary rulings concerning testimony by Botes's business attorney Kauffmann and Schrenko require reversal; (7) the cumulative effect of the evidentiary rulings requires reversal; (8) the denial of Botes's requests for specific jury instructions deprived Botes of his right to present a theory of defense; (9) the district court improperly enhanced Botes's sentence for obstruction of justice under § 3C1.1 of the sentencing guidelines; (10) his sentence was unreasonable; (11) the sentencing court violated Botes's Sixth Amendment rights when it considered facts that were neither admitted

by Botes nor found by the jury as part of their verdict; (12) the sentencing court denied Botes his right of allocution; (13) the factual basis for the order of restitution was clearly erroneous; (14) the order of forfeiture violated Botes's constitutional rights and was without statutory authority; and (15) Botes is entitled to access backup audiotape recordings of closing arguments and sentencing.

Upon careful review of the record and the parties' briefs, and with the benefit of having heard oral argument, we conclude that Botes's arguments have no merit. Accordingly, we affirm.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-15238-AA

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

A. STEPHAN BOTES,

Defendant-Appellant.

- - - - - - - - - - - - - - -

Appeal from the United States District Court
for the Northern District of Georgia

- - - - - - - - - - - - - - -

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Oct. 27, 2008)

BEFORE: WILSON, PRYOR and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Wilson
UNITED STATES CIRCUIT JUDGE

(2)

No. 08-1205

In the Supreme Court of the United States

A. STEPHAN BOTES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court, in denying petitioner's motion for a mistrial after the lead prosecutor at his trial was chosen to become a United States magistrate judge, correctly declined to apply an "appearance of impropriety" standard for the disqualification of the prosecutor.

2. Whether the court of appeals erred in affirming petitioner's sentence as procedurally reasonable, when petitioner did not object at sentencing that the district court was treating the Sentencing Guidelines as mandatory or presumptively reasonable, and the district court did not in fact do so.

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In the Supreme Court of the United States

No. 08-1205

A. STEPHAN BOTES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is reprinted in 290 Fed. Appx. 316.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2008. A petition for rehearing was denied on October 27, 2008 (Pet. App. 4-5). On January 15, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 26, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of one count of conspiracy to embezzle federal funds and defraud the State of Georgia of money and honest services, in violation of 18 U.S.C. 371; 11 counts of embezzlement of federal funds, in violation of 18 U.S.C. 666; and three counts of wire fraud, in violation of 18 U.S.C. 1343. Pet. App. 1-2. He was sentenced to 97 months of imprisonment, to be followed by three years of supervised release. *Id.* at 2. The district court entered an order of restitution and a criminal forfeiture judgment against petitioner in the amount of $382,394. *Ibid.* The court of appeals affirmed.

1. Petitioner participated in a series of transactions relating to the ultimately unsuccessful campaign of Linda Schrenko for the 2002 Republican gubernatorial nomination in Georgia. Schrenko was Georgia's State School Superintendent at the time of the primary campaign, and she had the authority to enter into contracts for goods and services for up to $50,000 on behalf of the Georgia Department of Education (GDOE) without seeking prior approval. The GDOE received about $650 million in funding from the United States Department of Education in 2002. Gov't C.A. Br. 6.

Petitioner, Schrenko, Schrenko's deputy (Merle Temple), and others orchestrated a scheme in which companies controlled by petitioner obtained more than $500,000 in GDOE funds using purported contracts in which little or nothing of value was provided to GDOE, and then secretly funneled a substantial portion of those funds back into Schrenko's gubernatorial primary campaign. Gov't C.A. Br. 6-20. Petitioner, Schrenko, Temple, and a fourth defendant (who was ultimately acquit-

ted) were variously indicted for conspiracy, embezzlement, wire fraud, money laundering, and structuring transactions.

2. a. Temple entered a plea agreement before trial. Doc. 62. The morning of May 1, 2006, petitioner, Schrenko and the fourth defendant began trial in the Northern District of Georgia. Later that day, the district judge presiding over petitioner's trial participated in the selection of a new United States magistrate judge for the Northern District of Georgia. See 28 U.S.C. 631(a). The judges of the district selected then-Assistant United States Attorney (AUSA) Russell Vineyard. AUSA Vineyard was the lead prosecutor at petitioner's trial, and it was anticipated that he would be sworn in as a magistrate judge in late October 2006, several months after the trial would conclude. 5/2/06 Tr. 166-167, 191.

On May 2, 2006, petitioner's counsel moved for a mistrial if AUSA Vineyard did not withdraw as government counsel. 5/2/06 Tr. 167. Petitioner had advised his counsel that he was concerned his attorneys would not zealously challenge AUSA Vineyard during trial. *Id.* at 169. Petitioner's counsel claimed that although there was no "actual impropriety," there was a serious issue of an appearance of impropriety, particularly if jurors were to learn that the district judge had supported AUSA Vineyard's selection. *Id.* at 170, 194. In response, AUSA Vineyard noted initially that petitioner's counsel had known of his pending application for some time and had raised no concerns. *Id.* at 172. The government further pointed out that—despite the common occurrence of federal prosecutors being candidates for, and being selected for, positions as magistrate judges—no party in petitioner's case had located a decision holding that a

prosecutor should be disqualified in such circumstances. *Id.* at 174-180, 183, 191. The government also contended that "appearance of impropriety" was not the standard for disqualification of trial counsel, and that the appearance of impropriety argument advanced by petitioner was "just the remotest speculation in this case." *Id.* at 188. Finally, the government argued that if AUSA Vineyard had any conflict of interest, it would stem from his "trying to appear neutral rather than [] vigorously representing the United States," but the government had no concern on that score and would waive any conflict. *Id.* at 189-191.

Petitioner's counsel repeatedly made it clear that petitioner was not seeking recusal of the district judge. 5/2/06 Tr. 187-188 ("THE COURT: * * * Your motion was not to recuse myself? MR. STEEL: No, sir."); *id.* at 196 ("[W]e're not asking to remove this honorable Court. We don't want to lose this Court."). Rather, petitioner suggested the court adopt a "bright line rule" that when attorneys "make[] it known that they will be with the Court * * *, they should not be prosecuting a case in the same courthouse where they will be working as the Court." *Id.* at 195.

After considering the arguments of counsel, the district judge declined to disqualify AUSA Vineyard or declare a mistrial. The district judge stated:

> [C]ounsel for the Defendants have perceived that my impartiality—that neither my impartiality nor Mr. Vineyard's impartiality is at issue in this case. They're more concerned about the public perception.
>
> Having taken all that into consideration, the Court is going to allow Mr. Vineyard to remain in the case until such time as he's sworn in as a U.S. Magis-

> trate. Therefore, I'm going to deny the Motion for Mistrial.

5/2/06 Tr. 199-200.

b. The trial resumed. Several days later Schrenko and the government reached a plea agreement. Gov't C.A. Br. 5 n.2. The jury found petitioner guilty on 15 counts, and acquitted him of the remaining counts.

c. Schrenko was sentenced first. Pursuant to her plea agreement, the district court imposed a sentence of 96 months of imprisonment, to be followed by three years of supervised release. Doc. 268. She did not appeal.

At petitioner's sentencing two months later, the district judge calculated petitioner's total offense level at 30 (with a base offense level of ten under Sentencing Guidelines § 2C1.7(a); an increase of 14 levels, pursuant to Sentencing Guidelines § 2B1.1(b)(1)(H), because of a loss amount of $614,387.50; an increase of four levels, pursuant to Sentencing Guidelines § 3B1.1(a), because of petitioner's leadership role in the offense; and an increase of two levels, pursuant to Sentencing Guidelines § 3C1.1, because of petitioner's obstruction of the investigation). Gov't C.A. Br. 26-28; 9/11/06 Tr. 3, 21-23, 27. With petitioner's category I criminal history, his advisory Sentencing Guidelines range was 97 to 121 months. *Id.* at 29.

Before the imposition of sentence, petitioner's counsel enumerated various considerations under 18 U.S.C. 3553(a) to support his argument for a "more lenient sentence than the guideline range calls for." 9/11/06 Tr. 62-66. The government countered that, given that petitioner remained "defiant and unrepentant" at sentencing and "characterize[d] himself as a victim," "a sentence within the guideline range would be appropriate

under the 3553(a) factors to promote respect for the law and to reflect the seriousness of the offense." *Id.* at 67. The judge then announced he would sentence petitioner within the guidelines range and imposed a sentence of 97 months of imprisonment, stating:

> Let the record reflect the Court had considered sentencing the defendant pursuant to 18 U.S.C. 3553 and the factors outlined therein. However, the Court decided not to since a more appropriate sentence can be imposed pursuant to the custody guideline range as outlined in the U.S. Sentencing Commission [Guidelines]. Also, the Court has sentenced the other defendants pursuant to the guideline range. And the Court hereby imposes [a sentence of 97 months of imprisonment].

Id. at 67-68. Petitioner raised no objection.[1]

Temple was sentenced the same day as petitioner, and like petitioner, he was sentenced to 97 months of imprisonment, to be followed by three years of supervised release. Doc. 284. He did not appeal.

3. Petitioner appealed. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1-3. The court of appeals stated that it had carefully reviewed the record and the briefs of the parties, and it listed petitioner's 15 arguments challenging his convictions and his sentence, including his claim that the district judge erred in denying a mistrial based on the selection of a prosecutor as magistrate and his claim that his sentence was unreasonable. *Id.* at 2-3. The court of

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[1] After the court pronounced sentence, petitioner's counsel renewed "[j]ust the objections previously made," 9/11/06 Tr. 71, but there had been no "objection[] previously made" to the district court's treatment of Section 3553.

appeals stated without further explanation that petitioner's arguments had "no merit," and it affirmed the judgment of the district court. *Id.* at 3.

ARGUMENT

1. Petitioner seeks review on the question whether a motion for a mistrial, based on the prosecutor's selection as a magistrate judge, is evaluated under an "appearance of impropriety" standard. Pet. i, 7-12. Petitioner identifies no other decisions addressing this issue, let alone a disagreement among the courts of appeals or a conflict with any decision of this Court. In any event, the decision of the court of appeals is correct. Further review of this claim is therefore unwarranted.

a. As both the petition and the extensive oral colloquy with the district court reflect (*e.g.*, 5/2/06 Tr. 187, 190, 191, 196), petitioner has uncovered no judicial decisions on the standard for recusing an attorney who is selected to be a magistrate judge (or for declaring a mistrial on that basis). The decision of the court of appeals rejecting petitioner's mistrial argument thus does not conflict with any decision of this Court or any other court of appeals. Moreover, the court of appeals' affirmance without opinion renders the basis for the judgment unclear. Rather than adopting the legal rule petitioner attributes to it, the court may instead have concluded there was in fact no meaningful "appearance of impropriety" (as the government had argued, *id.* at 188).[2]

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[2] To the extent that petitioner suggests (Pet. 9) that the government conceded that AUSA Vineyard's participation created an appearance of impropriety, he is mistaken. See Sup. Ct. R. 15.2. Although the government did not agree that "appearance of impropriety" was the standard for disqualification of counsel under the Georgia rules, the govern-

In any event, an "appearance of impropriety" standard has no application here. Under the American Bar Association's Model Rules of Professional Conduct—on which the Georgia Rules of Professional Conduct (Georgia Rules) are modeled—"the appearance of impropriety is not a ground for disqualifying a lawyer from representing a party to a lawsuit." *Waters* v. *Kemp*, 845 F.2d 260, 265 & n.12 (11th Cir. 1988); accord *State* v. *Shearson Lehman Bros.*, 372 S.E.2d 276, 279 (Ga. Ct. App. 1988) (applying Georgia Code of Professional Responsibility, which preceded the Georgia Rules) ("The case law is clear that counsel may not be disqualified on the basis of an appearance of impropriety alone.") (citing *Blumenfeld* v. *Borenstein*, 276 S.E.2d 607, 608 (Ga. 1981)). Petitioner cites no contrary authority. The Georgia Rules provide for disqualification of an attorney only where there is a conflict of interest that has not been properly waived (see Ga. R. Prof'l Conduct 1.7), but petitioner has identified no such conflict in this case—and if any conflict did exist, it would be the United States' conflict to waive, which the United States Attorney did, see 5/2/06 Tr. 191.

Petitioner nonetheless points (Pet. 10) to Georgia Rule 8.2(b), which provides that "[a] lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct." Petitioner argues (*ibid.*) that AUSA Vineyard, as a "candidate for judicial office," was subject to Canon 2 of the Georgia Code of Judicial Conduct (Code), "Judges Shall Avoid Impropriety and the Appearance of Impropriety in All Their Activities." As an initial matter, petitioner

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ment also stressed that petitioner's claims on that score were based on the "remotest speculation." 5/2/06 Tr. 188.

did not argue in the district court that the Code was applicable to AUSA Vineyard; review of that unpreserved claim accordingly would be for plain error only. Also, petitioner frames this as a matter of state ethics rules, an issue on which this Court ordinarily would not opine. See, *e.g.*, *Leavitt* v. *Jane L.*, 518 U.S. 137, 144 (1996) (per curiam) (Court does not normally grant a writ of certiorari to decide questions of state law).

Moreover, petitioner's argument is incorrect on the merits, for three reasons. *First*, Georgia Rule 8.2(b) by its terms subjects an attorney only to "applicable provisions" of the Code. Comment 2 to Georgia Rule 8.2 implies that the "applicable limitations" are only those "on political activity." *Second*, even if there are other "applicable provisions," avoidance of the appearance of impropriety is not one of them. The appearance of impropriety is measured by the "perception that the judge's ability to carry out *judicial* responsibilities with integrity, impartiality and competence is impaired," but a candidate for judicial office by definition has no such responsibilities. Code Canon 2A cmt. (emphasis added). *Third*, even if that test extended to *all* responsibilities, nothing in the circumstances here suggested that the selection of AUSA Vineyard made him unable to carry out his responsibilities "with integrity, impartiality and competence," *ibid.*

b. Petitioner further argues (Pet. 11) that the district judge should have recused himself pursuant to 28 U.S.C. 455(a) because the judge had supported the selection of AUSA Vineyard for the magistrate judge position. If this was error, petitioner invited it. Counsel twice made it clear petitioner did *not* seek the district judge's recusal and affirmatively requested the judge to remain on the case. See 5/2/06 Tr. 187-188; *id.* at 196

("[W]e're not asking to remove this honorable Court. We don't want to lose this Court."). There is no reason for this Court to "set aside [the] standing rule[], so necessary to the due and orderly administration of justice" that it will not review errors a petitioner invited below. See, *e.g.*, *Johnson* v. *United States*, 318 U.S. 189, 200-201 (1943) (citation omitted).

Even if the Court were to overlook this threshold bar to petitioner's claim, he offers no objectively reasonable basis for questioning the district judge's impartiality in handling his case. See 28 U.S.C. 455(a). Recusal accordingly would have been unwarranted, as the only relevant appellate authority confirms. See *Pickard* v. *United States*, 170 Fed. Appx. 243 (3d Cir.) (affirming district judge's denial of defendant's motion to recuse following the district judge's participation in selection of defendant's former counsel to become magistrate judge), cert. denied, 549 U.S. 935 (2006).

c. Finally, petitioner asks the Court (Pet. 12) to grant the petition for a writ of certiorari, vacate the judgment below, and remand for further consideration in light of *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). That course of action is unwarranted. *Caperton* addressed whether the Due Process Clause requires an elected judge to recuse when he has "received campaign contributions in an extraordinary amount" from the corporate chairman of a party in a high-stakes case before him. *Id.* at 2256. AUSA Vineyard's continued participation as a prosecutor in petitioner's case after his selection does not present a question involving judicial bias or financial support, nor did petitioner contend below that his due process rights were violated by AUSA Vineyard's continued representation of the United States.

2. Petitioner next contends (Pet. 12-17) that the court of appeals treated the advisory Sentencing Guidelines range as "*de facto* mandatory" in violation of *United States* v. *Booker*, 543 U.S. 220 (2005), or as supplying the "presume[d] * * * sentence" in violation of *Rita* v. *United States*, 551 U.S. 338 (2007). Petitioner failed to preserve that claim below, there is no reason to think the court of appeals' affirmance rested on an incorrect understanding of *Booker* or *Rita*, and in any event the claim is unsupported by the record.

a. In *Booker*, the Court held that because the Sentencing Reform Act of 1984 made the federal Sentencing Guidelines mandatory, a Guidelines sentence that is enhanced based on facts found by the judge violates the Sixth Amendment jury trial right. 543 U.S. at 230-244. To remedy the Guidelines' constitutional defect, *Booker* invalidated provisions of the Sentencing Reform Act that made the Guidelines mandatory, 18 U.S.C. 3553(b) and 3742(e), thereby "mak[ing] the Guidelines effectively advisory." 543 U.S. at 245. This Court further held in *Rita* that a court of appeals may apply a "presumption of reasonableness" to a within-Guidelines sentence, but that "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." 551 U.S. at 351.

The Eleventh Circuit recognizes that *Booker* renders the Guidelines advisory only. See, *e.g.*, *United States* v. *Shelton*, 400 F.3d 1325, 1331 (2005) ("As a result of *Booker*'s remedial holding, *Booker* error exists when the district court misapplies the Guidelines by considering them as binding as opposed to advisory."). Likewise, even before *Rita*, the Eleventh Circuit rejected the view that district courts could treat a Guidelines sentence as

presumptively reasonable. See, *e.g.*, *United States* v. *Hunt*, 459 F.3d 1180, 1184-1185 (2006).

b. Nothing in the court of appeals' decision suggests it failed to apply those rules here. Petitioner focuses (Pet. 14) on the district judge's comment that he "had considered sentencing the defendant pursuant to 18 U.S.C. § 3553 and the factors outlined therein," but "decided not to since a more appropriate sentence can be imposed pursuant to the custody guideline range as outlined [by] the U.S. Sentencing Commission." 9/11/06 Tr. 67. Petitioner contends that this reflects the district court's treatment of the Sentencing Guidelines as mandatory (Pet. i, 12-14) or presumptively reasonable (Pet. 15-16). That claim lacks merit.

Petitioner did not object to the district court's treatment of Section 3553(a). A procedural error at sentencing is subject to the general principle that any error "not brought to the [district] court's attention" is forfeited on appeal, unless it meets the standard for reversible plain error. Fed. R. Crim. P. 52(b); see *United States* v. *Olano*, 507 U.S. 725, 732 (1993). The courts of appeals agree that where, as here, a district court asks the parties if they have any objections to the sentence and "the relevant party does not object, then plain-error review applies on appeal to those arguments not preserved in the district court." *United States* v. *Vonner*, 516 F.3d 382, 385 (6th Cir.) (en banc), cert. denied, 129 S. Ct. 68 (2008). "[N]o court of appeals * * * has rejected this * * * approach to clarifying objections to a criminal sentence." *Id.* at 391. See, *e.g.*, *In re Sealed Case*, 527 F.3d 188, 191-192 (D.C. Cir. 2008); *United States* v. *Perkins*, 526 F.3d 1107, 1111 (8th Cir. 2008); *United States* v. *Mangual-Garcia*, 505 F.3d 1, 15 (1st Cir. 2007), cert. denied, 128 S. Ct. 2081 (2008); *United States* v. *Verk-*

hoglyad, 516 F.3d 122, 127-128 (2d Cir. 2008); *United States* v. *Lopez-Velasquez*, 526 F.3d 804, 806 (5th Cir.), cert. denied, 129 S. Ct. 625 (2008); *United States* v. *Knows His Gun*, 438 F.3d 913, 918 (9th Cir.), cert. denied, 547 U.S. 1214 (2006); *United States* v. *Lopez-Flores*, 444 F.3d 1218, 1220-1221 (10th Cir. 2006), cert. denied, 127 S. Ct. 3043 (2007); see also *United States* v. *Dragon*, 471 F.3d 501, 505 (3d Cir. 2006). Petitioner therefore must show "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights,'" before the court of appeals would have discretion to reverse. *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (quoting *Olano*, 507 U.S. at 732) (brackets in original). He cannot make any of these three threshold showings.[3]

First, petitioner's claim fails because the district court committed no error. A fair reading of the sentencing proceedings here does not suggest the district court thought the Guidelines were binding or entitled to a presumption of reasonableness. At sentencing, both defense counsel and the prosecution addressed the possibility of a sentence outside the calculated Guidelines range based on other Section 3553(a) factors, with the defense arguing for a sentence below the Guidelines range and the prosecutor stating that "a sentence within the guideline range would be appropriate under the 3553(a) factors." 9/11/06 Tr. 62-67. In the context of a choice between a below-guideline sentence driven by the Section 3553(a) factors, and a within-guideline sentence driven by those same factors (including the guidance provided by the advisory Sentencing Guidelines), the only fair reading of sentencing judge's statement that a

[3] The government took no position in the court of appeals on whether petitioner had preserved this issue for review, because the absence of error, see pp. 13-14, *infra*, was sufficient to dispose of petitioner's claim.

"more appropriate sentence can be imposed pursuant to the custody guideline range," *id.* at 67, is that the Section 3553(a) factors on balance warranted a sentence that fell within petitioner's Guidelines range. The claim that the district court "did *not* impose a sentence with reference to the [Section 3553(a)] factors" (Pet. 14) is belied by the very reasons the court gave in imposing the sentence it did—a belief that the Guidelines provide a "more appropriate" sentence, and a concern that a defendant be sentenced similarly to equally culpable "other defendants [sentenced] pursuant to the guideline range" (9/11/06 Tr. 67). Those are considerations enumerated in Section 3553(a). See 18 U.S.C. 3553(a)(4) and (6).[4]

Second, petitioner cannot establish that any error was "obvious," *Olano*, 507 U.S. at 734, and any ambiguity results from his failure to request clarification. Had petitioner objected when the court gave its reasons for imposing the sentence it did, the district court would have had an opportunity to state (as petitioner supposes) that it was openly disregarding *Booker*'s remedial holding, or (far more likely) that it had considered the factors in Section 3553(a) and concluded that a sentence at the low end of petitioner's Guideline range was "a sentence sufficient, but not greater than necessary, to comply with the purposes" of Section 3553(a)(2). Any ambiguity must be resolved against petitioner, because he

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[4] Petitioner notes (Pet. 13) two other points in the sentencing hearing where the district judge stated he would impose a sentence within the Guidelines range. See 9/11/06 Tr. 4, 29. The district judge's statements that he intended to impose a within-Guidelines sentence do not suggest that he believed such a sentence was mandatory or that he presumed such a sentence would be reasonable.

must carry the burden of demonstrating obvious error. See *United States* v. *Vonn*, 535 U.S. 55, 58 (2002).

Third, petitioner fails to meet his burden of showing that any error affected his substantial rights—that in the absence of error, the district court would have imposed a lower sentence. Petitioner suggests that the district court's "mandatory application of the Guidelines" caused it to "[c]ompletely ignore[]" petitioner's background, the collateral consequences of his prosecution, and his low risk of recidivism. Pet. 17. Again, the record shows otherwise. At sentencing, the district court listened to seven witnesses called on petitioner's behalf (9/11/06 Tr. 31-46); petitioner's lengthy address to the court spanned 15 pages of transcript (*id.* at 47-62); and counsels' argument on the 3553(a) factors spanned five more pages (*id.* at 62-67). The district court did not suggest the Guidelines made this an empty exercise; rather, the court listened to the testimony and argument, considered it, and pronounced sentence.

Rather than supporting petitioner's claim of prejudice, the record supports the conclusion that the district court would *not* have sentenced petitioner to a term of imprisonment of less than 97 months: The district court was evidently concerned about avoiding sentencing disparities between petitioner and his co-defendants. See 9/11/06 Tr. 67 ("[T]he Court has sentenced the other defendants pursuant to the guideline range."). The court sentenced Schrenko and Temple (defendants who pleaded guilty, no less) to 96 months and 97 months, respectively. See pp. 5-6, *supra*. There is no reason to think that the court would have applied the Section 3553(a) factors to sentence petitioner—who was equally culpable, and remained unrepentant even at sentencing,

see 9/11/06 Tr. 47-62—to a lighter prison term than Schrenko and Temple.

c. Petitioner asks (Pet. 15) that the petition be granted, the judgment of the court of appeals vacated, and the case remanded (GVR) for consideration in light of *Nelson* v. *United States*, 129 S. Ct. 890 (2009) (per curiam). *Nelson* is inapposite because there it was "plain from the comments of the sentencing judge that he did apply a presumption of reasonableness to Nelson's Guidelines range," *id.* at 892, yet the court of appeals had affirmed his sentence, contrary to *Rita*. As discussed above, it is anything but "plain from the comments of the sentencing judge that he did apply a presumption of reasonableness"—the reasonable reading is the opposite, and any ambiguity traces to petitioner's failure to ask the district court to clarify its treatment of Section 3553(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2009

No. 08-1205

In The

Supreme Court of the United States

A. STEPHAN BOTES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

I. Whether the Eleventh Circuit Court of Appeals erred by accepting the government's position that appearance of impropriety is *not* the proper standard for recusal of trial court and judicial candidates.

II. Whether the Eleventh Circuit Court of Appeals appellate review for "unreasonableness" has preserved de facto mandatory Guidelines, contrary to this Court's ruling in *Booker*[1] and its progeny.

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[1] *Booker v. U.S.*, 125 S.Ct. 738, 543 U.S. 220 (2005).

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ARGUMENT AND CITATIONS OF AUTHORITY

I. APPEARANCE OF IMPROPRIETY IS THE PROPER STANDARD FOR RECUSAL OF A JUDGE, AS WELL AS THE RECUSAL OF A JUDICIAL CANDIDATE.

The government seeks to recast the issue presented in the case as being solely related to the recusal of the prosecution's attorney. Opposition Brief, 8. The reason the government seeks to recast the issue is to deflect attention from its failure to respond to Botes' argument.

1. The government complains that Botes has failed to uncover any decision on the standard for recusing an attorney who is selected to be magistrate judge, or for declaring a mistrial on that basis. Opposition Brief, 7. Pursuant to Sup. Ct. R. 10(c), this Court may exercise its discretionary power of review if a Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. By rejecting the appearance of impropriety standard regarding the recusal of the lead prosecutor who was also magistrate-elect, the district court committed reversible error. Thus, this Court should settle the question, because as counsel for the government pointed out, it is a common practice throughout the districts for magistrate judges to be selected from the ranks of Assistant

United States Attorneys.[2] As this situation appears to be widespread and reoccurring, this Court should exercise its discretion to resolve this important federal question.

The district court's rejection of the appearance of impropriety standard also contravenes this Court's recent pronouncement in *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009). Pursuant to Sup.Ct. R. 10(c) this Court may properly exercise its discretion when a Court of Appeals has decided an important federal question in a way which conflicts with this Court's relevant decisions.

2. In its brief in opposition the government unsuccessfully attempts to distinguish the holding in *Caperton*. Opposition Brief, 10. The import of *Caperton* to Botes' case is that the government argued, both in the district and circuit courts, that the "appearance of impropriety is simply too slender a reed on which to rest a disqualification order except

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[2] At the in-chambers conference between counsel, the government, and the district court, the U.S. Attorney argued that although "this situation arises with enormous regularity, that people in the U.S. Attorney's Offices apply for magistrate positions . . . " and "for every magistrate position, there are probably many Assistant U.S. Attorney who apply. There are many who get on the short list. There are many who get selected, including in this district former Assistant U.S. Attorneys King, Deane, and Brill who all served as magistrate judges. Never before to our knowledge has – have those applicants or selected people . . . been required to recuse themselves from the matters they supervise." Tr.189-90. See also, Tr.91.

in the rarest of cases," and that "appearance of impropriety standard was the standard under the old model code that was in effect until 2000." *Caperton* establishes unequivocally that the proper standard to evaluate recusal remains the appearance of impropriety.

The issue does not turn, as the government suggests, on whether the judge was elected by the voters of a particular state, or was selected after an election held by the district court judges, or even whether campaign finances are responsible for the appearance of impropriety. The majority opinion reaches its conclusion on the ultimate matter, which admittedly *did* concern an elected judge accepting an extraordinarily extensive contribution to his judicial campaign from a litigant, only after discussing a myriad of circumstances which would provoke recusal at common law. *Caperton*, 129 S.Ct. at 2250-60.

Caperton emphasized that a "basic requirement of due process" is a "fair trial in a fair tribunal." *Caperton*, 129 S.Ct. at 2259. Noting that "[e]very procedure which would offer a possible temptation to the average man as a judge . . . " "or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law," the Court analyzed the facts of the case. *Caperton*, 129 S.Ct. 2260. The Court explained:

> As new problems have emerged that were not discussed at common law, however, the

> Court has identified additional instances which, as an objective matter, require recusal. These are circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'

Id., citing, *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456 (1975).

Tellingly, the *Caperton* majority discussed the role the judge's prior relationships could play in requiring recusal under the Due Process Clause. 129 S.Ct. 2261-62. Here, it is an examination of the change in relationships between the individuals involved which compels the conclusion that an appearance of impropriety infected the trial of the case, and that the Due Process Clause required recusal of the prosecutor or the judge.

The *Caperton* Court concluded that the judges' subjective inquiry into whether or not he was actually biased was error. Instead, the proper inquiry is whether, "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.*, at 2263, citing *Withrow*, *supra*, 421 U.S. at 47, 95 S.Ct. 1456. Thus, *Caperton* concluded the proper standard was whether there was an appearance of impropriety, and not, as the government urged in the district and circuit courts, whether there was an actual conflict.

Caperton, 129 S.Ct. at 2265. Because the district and circuit courts erred by using an improper standard, Botes' trial was infected with the appearance of impropriety, and his conviction must be reversed.

3. From the first time Botes raised the issue to its present response, the government has sought to limit consideration to the question of whether the AUSA could fulfill his function as a prosecutor "with integrity, impartiality and competence." Opposition Brief, 9, citations omitted; Tr.191. This argument fails to respond to Botes' claim, which he urged in the district and circuit courts, that the AUSA's elevation to the position of magistrate-judge placed defense counsel in the untenable position of openly opposing an individual who would soon be ruling on matters presented by his defense counsel in other cases. Tr.169, 204; Circuit Brief, 14-15. Defense counsel specifically argued that Botes was concerned his defense counsel would not be as zealous against the prosecutor, who would soon be ruling on counsel's motions and making decisions affecting his future clients. Tr.169, 204. Moreover, defense counsel also made the court aware that Botes was concerned that the district court's impartiality could reasonably be questioned in light of the new relationship created by the AUSA accepting the position as the employee of the district court and, further, that the district court had affirmatively participated in the decision to select the AUSA as the magistrate judge. Tr.170, 196. Botes made it clear that his motion for mistrial was based on the twin propositions that his case should not be

prosecuted by an individual who had accepted a position as the employee of the judge in the case, and further, his defense counsel could not be expected to put aside his professional interest in not antagonizing a magistrate judge-elect, before whom he would shortly be appearing. Defense counsel specifically stated that Botes, "fear[ed] that this Honorable Court may favor [the AUSA]," and cited two cases wherein the issue concerned the appearance of impropriety of the judge, not the prosecutor. Tr.168-170, *United States v. Young*, 481 U.S. 787 (1987); *Scott v. United States*, 559 F.2d 745 (D.C.Cir. 1989). The government has simply ignored these portions of the proceedings in its attempt to refocus the argument due to its weak position on Botes' actual argument.

4. The government complains that the petitioner frames this as a matter of state ethics rules, "an issue on which this Court ordinarily would not opine." Opposition Brief, 9. Again, Botes frames the issue as whether the proper standard to evaluate the recusal of the district court or the magistrate judge-elect simultaneously acting as the lead prosecutor in the case, was the appearance of impropriety. The government disputed that was the proper standard. The fact that both the judge and the magistrate judge-elect were bound to avoid even the appearance of impropriety, is merely another circumstance which compels the conclusion that under an objective standard, either the magistrate judge-elect should have stepped down as the prosecutor, or the district court should have had a duty to recuse.

5. a. Defense counsel clearly explained to the district court that the problem attendant upon the continued participation by the AUSA, after accepting the appointment as magistrate judge, centered on his disquiet in challenging the AUSA, who would soon be the judge in various matters he would be litigating, and that the court would favor his employee.[3] The government and the district court ignored defense counsel's points, and in the Circuit, the government continued to ignore these citations to the record. Here, the government misstates defense counsel's point. Rather, defense counsel maintained that *if* the prosecution remained on the case, the court's rulings could be misconstrued – thus creating the appearance of impropriety. See, Tr.196. Clearly, defense counsel stated his preference that the matter be resolved in favor of keeping the district court, as opposed to keeping the present prosecutor. This is simply not the same as inviting error.

Regardless, 28 U.S.C. § 455(a) is an "affirmative, self-enforcing obligation to recuse *sua sponte* whenever proper grounds exist." *United States v. Kelly*, 888 F.2d 732 (11th Cir. 1989), rendering the government's argument toothless.

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[3] The government has yet to articulate a reason Botes would be concerned with whether a prosecutor could ethically continue to prosecute his case because of a conflict of interest. More to the point, within minutes of determining the AUSA was going to be a magistrate judge, defense counsel apologized to the AUSA three times for causing inconvenience with the motion for mistrial. Tr.168 at lines 1, 10, and 12.

b. There is no question that at the outset, all of the parties, as well as the court, recognized the appearance of impropriety inherent in the situation. The court said so, and the government never disputed this, only pointing out that the appearance of impropriety was not the appropriate standard, and that Botes must establish an actual conflict of interest for the prosecutor. Tr.173, 177, 185. In the circuit court the government never addressed Botes' contention regarding the appearance of impropriety, again choosing to characterize the issue as being whether the recusal of prosecutor requires the defense to establish a prosecutor's actual conflict of interest. Gov. Circuit Brief, 36-38. The Government, as Botes argued in his circuit Reply Brief and reiterates now, failed to acknowledge his argument in the district court, in the circuit, or in this Court, that he included in his objection the problem with the judge remaining in the case, in the event that the prosecution, as magistrate judge-elect, remained. Pet. 8; Circuit Reply Brief, 10; Circuit Brief, 14-15. Indeed, it seems quite unremarkable that under an objective standard, a member of the public would reasonably question the fairness of a court hearing a case his employee was prosecuting, and in which defense counsel was placed in the position of attacking an individual, before whom he would be appearing in the future.

Although the district court in Botes' case conducted an analysis of whether he was actually biased, the district court, just as the judge in *Caperton*, failed to complete the process, as he was led by the

government to believe the proper standard was actual bias, instead of the appearance of impropriety.

6. The government also complained Botes had offered "no objectively reasonable basis for questioning the district judge's impartiality in handling his case." Opposition Brief, 10. To the contrary, Botes noted that his case was close and he won an acquittal on more than two-thirds of the government's allegations. At issue was a critical jury charge which Botes contended deprived the jury of the ability to fairly judge the evidence. In his Circuit brief, Botes noted an example of the district court disclosing defense strategy in aid of the prosecution, and an example of the district court supporting the prosecution's contention that an incriminating conversation which Botes denied having, had actually occurred. Tr.382, 383, 699. Thus, Botes established the reasonableness of a lay observer concluding that the district court favored the prosecution in the case, and, as a result, the conviction was tainted. Reversal is required under these circumstances.

II. THE DISTRICT COURT TREATED THE SENTENCING GUIDELINES AS *DE FACTO* MANDATORY IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

a. Botes argues that the explicit comments of the district court establishes that the court indulged in the unconstitutional presumption that the Guidelines applied. Pet. 13-14. He pointed out that the

judge stated, as the hearing was beginning, that it was going to sentence within the guideline range, reiterated this comment after making the Guidelines rulings, and, in the statement of reasons for the imposition of sentence, said that the Court had considered sentencing the defendant pursuant to 18 U.S.C. § 3553, but decided ***not*** to because the guidelines range was more appropriate, and he had applied the Guidelines in the co-defendants' cases. Sent. Tr.4, 20, 67. The district court did not say that it considered the factors, or that he felt the sentence met the goals of the sentencing. Sent. Tr.67. Despite this, the government contends a "fair" reading of the transcript does not suggest the court thought the Guidelines were binding or entitled to a presumption of reasonableness. Opposition Brief, 12, 14 fn. 4.

To the contrary, the district court demonstrated, by both words and action, that it presumed a Guidelines sentence should be imposed in the case. Further, the comments revealed a fundamental misunderstanding regarding the process. The court said it was to either consider the factors, or the Guidelines. The comment reveals that the court did not recognize that the Guidelines are but one of several factors.[4] The announcement that judge intended to impose a sentence within the Guidelines range was more than

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[4] The judge also characterized the defense request to impose a sentence below the guideline range as a "request that he be sentenced pursuant to 3553," providing further evidence of misunderstanding. Sent. Tr.67.

a suggestion that he presumed a Guidelines sentence would be reasonable, instead, it is compelling evidence that the judge ***actually*** applied a presumption regarding the Guidelines.

In any event, the government contends in this Court that Botes did not preserve the issue in the district court, and cannot establish plain error.[5] Opposition Brief, 15. The government is incorrect regarding the standard of review. In *Booker*, this Court excised the standard of review portion of the Sentencing Reform Act, 18 U.S.C. § 3742(e)(4). In *Booker v. United States*, 543 U.S. 220, 259, 125 S.Ct. 738. In *Gall v. United States*, this Court further explained:

> Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or

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[5] Interestingly, the Government did not raise plain error as a defense to this issue in the Circuit court, contending instead that the sentence was reasonable and characterizing the issue as whether the failure by the district court to mechanistically recite the § 3553(a) factors was error. Government Eleventh Circuit Brief, 63.

> failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.

Gall v. United States, 128 S.Ct. 586, 597 (2007). This passage clearly directs the appellate court to review all sentences, regardless of whether an objection was interposed after its imposition.

The government attempts to distinguish *Nelson v. United States*, 129 S.Ct. 890 (2009), on the grounds that the comments by the court in *Nelson* were plain, whereas the comments by the court in *Botes*, were ambiguous. Opposition Brief, 16. Here the court was clear – the court explicitly announced its intentions and then implemented a Guidelines sentence, as announced. Because the court implemented a presumption that the Guidelines should be imposed, *Nelson* clearly controls and this Court should reverse in light of the similarities in the cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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